No. 47632-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LEROY PARKER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Schaller, Judge
Cause No. 13-1-01196-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether, when the defendant stipulated to having two prior convictions for violating no contact orders issued under Washington law, he necessarily stipulated that the previous orders were entered pursuant to one of the specific RCW chapters listed in former RCW 26.50.110(5).

2. If the defendant did not stipulate to the admissibility of his prior convictions, whether he waived a challenge to the admissibility of those prior convictions by failing to object in the trial court.

3. If the failure to prove that the previous convictions were for violating qualifying orders was error, whether it was harmless error.

4. If the failure to prove that the previous convictions were for violating qualifying orders was error, whether it was invited error.

5. If the failure to prove that the previous convictions were for violating qualifying orders was reversible error, whether the remedy is dismissal or remand for entry of judgment for the gross misdemeanor crime of violation of a no-contact order.

B. STATEMENT OF THE CASE.

The State accepts the Appellant's statement of the case.

C. ARGUMENT.

1. By stipulating to the two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Washington State law, Parker necessarily stipulated to the validity of the orders that were violated.

Parker argues for the first time on appeal that the State failed to prove the validity of the orders that he was previously convicted of violating.

Leroy Parker was charged with two counts of felony violation of a pretrial no contact order, domestic violence, third or subsequent violation of any similar order, pursuant to RCW 26.50.110(5). CP 8. The charging language specified that the prior orders were issued under RCW Chapters 10.99, 26.09, 26.10, 26.26, 26.50, 25.52, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020. Id.

RCW 26.50.110(5) provides:

> A violation of a court order issued under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

At trial, before voir dire, Parker's attorney advised the court that there would be a stipulation to the fact that he had two or more prior convictions for violations of protection or no contact orders.

RP 22-23.[1] The stipulation was read to the jury shortly before the State rested its case in chief. RP 150. It read:

> The parties have agreed that certain facts are true. You must accept as true the following facts:
> The defendant has at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Washington State Law.

CP 47.

A limiting instruction was also read to the jury. RP 164. Both the stipulation and the limiting instruction were included in the final jury instructions. CP47. At no time did Parker object to the stipulation or advise the court that he was not stipulating to the fact that the prior convictions were for violating qualified orders. He did request that the court read the limiting instruction to the jury after the stipulation was read. RP 153.

> a. A stipulation to evidence which constitutes an element of an offense relieves the State of the duty to produce that evidence. It waives any objection to the admission of the evidence.

No contact orders, the violation of which resulted in the prior convictions for violation of a no-contact order or protection order, must have been issued pursuant to the statutes identified in RCW

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1 All references to the Verbatim Report of Proceedings are to the two-volume trial transcript dated September 24, 2014, September 29-30, 2014, and October 1, 2014.

26.50.110(5) before those convictions can elevate a subsequent violation of a restraining or no-contact order from a gross misdemeanor to a class C felony. It is well settled that the validity of those previous orders is not an element of the offense of felony violation of a no-contact order. State v. Carmen, 118 Wn. App. 655, 663-64, 77 P.3d 368 (2003), *review denied*, 151 Wn.2d 1039, 95 P.3d 352 (2004); State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005); State v. Gray, 134 Wn. App. 547, 556, 138 P.3d 1123 (2006), *review denied*, 160 Wn.2d 1008, 158 P.3d 615 (2007). Rather, the statutory basis for the prior orders is a question of admissibility; if the prior orders were not issued pursuant to the requisite statutes, evidence of the convictions for violating them is irrelevant and should not be submitted to the jury. Carmen, 118 Wn. App. at 663-64; Miller, 156 Wn.2d at 31; Gray, 134 Wn. App. at 556. It is a question of law to be decided by the court. Miller, 156 Wn.2d at 31; Carmen, 118 Wn. App. at 665.

Parker cites to State v. Case, 189 Wn. App. 422, 358 P.3d 432 (2015), *review granted*, 185 Wn.2d 1001, 366 P.3d 1243 (2016).[2] That case, under almost identical facts, reversed the defendant's conviction because the State had failed to produce

2 Oral argument is scheduled for June 21, 2016, www.courts.wa.gov/appellate_trial_courts/supreme/calendar.

evidence that the previous convictions were for violating qualifying orders. Even though the court in Case found the evidence which went to the jury sufficient to support a conviction, it further found there was insufficient evidence to admit the fact of the prior convictions. Id. at 429-30. The State argues that Case was wrongly decided and should not be followed.

> b. A defendant may stipulate to the fact of his prior convictions. It follows that he is stipulating to the admissibility of those convictions.

If the fact of a prior conviction, rather than specific facts about the crime underlying that conviction, proves an element of the crime charged, the defendant may offer to stipulate to the fact of the conviction and prevent the State from offering documentary or other proof of the conviction, which may contain prejudicial information about the defendant. Old Chief v. United States, 519 U.S. 172, 174, 117 S. Ct. 644, 136 L. Ed 2d 574 (1997); State v. Johnson, 90 Wn. App. 54, 63, 950 P.2d 981 (1998).

A stipulation to facts which prove an element of the crime charged waives the right to a jury trial as to that element. State v. Humphries, 181 Wn.2d 708, 714, 336 P.3d 1121 (2014); United States v. Mason, 85 F.3d 471, 472 (10th Cir. 1996); State v. Stevens, 137 Wn. App. 460, 466, 153 P.3d 903 (2007), *review*

denied, 162 Wn.2d 1012, 175 P.3d 1094 (2008). Implicit in the holding in Case, and in Parker's argument, is that assumption that the defendant stipulates to the facts but not to the admissibility of those facts. It is true that a stipulation to a legal conclusion is not binding on the court. State v. Drum, 168 Wn.2d 23, 33, 225 P.3d 237 (2010) ("[C]ourts are not bound by stipulations to legal conclusions.") In Drum, a defendant who entered drug court stipulated that if he were removed from the program, which he eventually was, the court could determine his guilt based upon the police reports and other documents and he further stipulated that those documents contained sufficient evidence to find him guilty of the charges. Id. at 28.

Stipulating to prior convictions, however, presents a different issue. Parker stipulated to the fact of his prior convictions presumably so that the jury would not learn any details of those offenses by reading the judgments and sentences. It is apparent from the record that he did not anticipate that the State would also offer evidence of the admissibility of those convictions. It is also apparent that the trial court and prosecutor believed that Parker was stipulating that the orders violated in his prior convictions were issued under the required statutes. Parker did not object to the

stipulation being read to the jury; he did not object to it being included in the jury instructions. RP 57. He did not argue during closing that the State had not proved the element of the prior conviction. He did not bring a post-conviction motion for a new trial based upon insufficiency of the evidence. He did nothing but act in a manner that indicated he was agreeing that the fact of his prior convictions was admissible.

When a defendant stipulates to facts that prove an element of the charged crime, he waives his right to require the State to prove that element. State v. Wolf, 134 Wn. App. 196, 199, 139 P.3d 414 (2006), *review denied*, 160 Wn.2d 1015, 161 P.3d 1028 (2007). In Wolf, the defendant was tried for felon in possession of a firearm. He stipulated that he had previously been convicted of a serious offense. Id. at 196. The Court of Appeals held that he waived his right to require the State to prove that element of the crime. Id. at 199. There was no discussion as to whether the State was still required to prove to the trial court that Wolf's prior conviction was in fact for a serious offense.

> A stipulation is "an express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact," with the effect that "*one party*

need offer no evidence to prove it and the other is not allowed to disprove it."

Key Design, Inc. v. Moser, 138 Wn.2d 875, 893-94, 983 P.2d 653 (1999), *quoting* 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2588, at 821 (James H. Chadbourn rev. ed. 1981) (emphasis added in Key Design).

There does not appear to be a Washington case which squarely addressed whether or not a stipulation to certain facts also stipulates that the State does not have to prove the admissibility of those facts.

In State v. Ortega, 134 Wn. App. 617, 142 P.3d 175 (2006), *review denied*, 160 Wn.2d 1016, 161 P.3d 1027 (2007), the defendant was convicted of three counts of felony violation of a no-contact order. Before trial, he offered to stipulate that if he were convicted of the current charges, they would be felonies. Id. at 623. The trial court ruled that any stipulation would have to say that he had been convicted twice of violating protection orders. He made that stipulation. Id. On appeal, the Court of Appeals said that because the statute under which Ortega was charged required that the prior convictions be for specific crimes, the trial court did not err in refusing a stipulation that avoided the statutory language. Id. at

624. Ortega also argued that the trial court erred by admitting the fact of his prior convictions without first determining whether the orders violated in the prior convictions were issued under the requisite statutes. The Court of Appeals found that he had waived that challenge because he did not object in a timely manner. Id. at 625-26.

Oretega answers a slightly different question than whether the State still has a burden to prove the admissibility of the prior convictions; all that can be said is that if there is such a burden, the failure to raise it in the trial court waives a challenge on appeal. From that, however, follows a conclusion that if the defendant has a duty to object to the entry of a stipulation where the statutory basis of the prior convictions has not been proved to the court, at a minimum the stipulation relieves the State of any such burden unless the defendant specifically limits his stipulation.

In State v. Stevens, 137 Wn. App. 460, 153 P.3d 903 (2007), *review denied*, 162 Wn.2d 1012, 175 P.3d 1094 (2008), the defendant was charged with four counts of unlawful possession of firearms. Id. at 464. The charge was based upon an Oregon conviction for first degree rape. At trial he stipulated that he had been previously convicted of a serious offense. Id. Stevens argued

on appeal that his stipulation was limited, and that the State still had the burden to prove his Oregon conviction was equivalent to a serious offense in Washington. The Court of Appeals adopted the reasoning of Wolf and found that "once a defendant enters into a stipulation, he or she waives the right to require the government to prove its case on the stipulated element." Stevens, 137 Wn. App. at 466; Wolf, 134 Wn. App. at 200.

If the State is relieved of its burden of proof regarding an element of the crime, it logically follows that the State is relieved of all aspects of that proof, including the admissibility of the facts constituting the element. This is particularly so in situations such as Parker's where he did not at any time indicate to the court that he did not expect the jury to hear his stipulation. It makes no sense that he would have stood by silently while evidence that he believed was inadmissible was given to the jury. It is true that his belief does not control the question of law, but it does speak to whether or not he waived a challenge for the first time on appeal. He did not claim ineffective assistance of counsel for failing to object.

2. The failure to object to the admission of evidence of the prior convictions without proof of the statutory basis of the prior orders waives a challenge to the admissibility on appeal.

Generally, a reviewing court will not consider an evidentiary issue that is raised for the first time on appeal because failure to object deprives the trial court of the opportunity to prevent or cure any error. RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). A narrow exception, however, exists for "manifest error[s] affecting a constitutional right." RAP 2.5(a)(3); Kirkman, 159 Wn.2d at 936. There is no constitutional issue involved here, nor has Case claimed that there is.

In Carmen, the State at trial offered certified copies of the judgment and sentence in each of the prior convictions. Neither one specified the statutory authority for the orders that were violated. Id. at 657. Carmen did not object. Id. at 663. At sentencing, the trial court verified that both of the previous orders were valid. Id. at 664. The Court of Appeals held that because Carmen did not object to the admission of the judgments and sentences and because the trial court "cured the evidentiary gap," he waived any challenge to the admission of the prior convictions. Id. at 668.

In Miller, the defendant did not contest or concede the validity of the previous orders, and it is not apparent from the opinion what evidence was offered to the jury. Miller, 156 Wn.2d at

25-26. After concluding that the validity of the prior convictions was a question of admissibility rather than an element of the charged crime, the court said, "As Miller has not shown that this order was invalid, deficient, or otherwise inapplicable to the crime charged, his conviction is affirmed[.]" Id at 32. This holding is consistent with finding waiver where an objection was not raised below.

In Gray, the State offered a judgment and sentence for one prior conviction and a Statement of Defendant on Plea of Guilty for the other. Gray did not object to either. At the conclusion of the State's case, Gray moved to dismiss the felony allegation on the grounds the State had failed to prove one of them was based upon a no-contact order issued under the requisite statutes. Gray, 134 Wn. App. at 551. The Court of Appeals held that Gray waived his objection. "To assign error to a ruling that admits evidence, a party must raise a timely objection on specific grounds." Id. at 557-58. *See also* State v. Cochrane, 160 Wn. App. 18, 27, 253 P.3d 95 (2011) ("Cochrane did not object or argue that the two Seattle Municipal Court convictions do not meet the statutory definition. We conclude Cochrane waived his right to object to the admissibility of the dockets establishing those convictions for the first time on appeal."); State v. Chambers, 157 Wn. App. 465, 480,

237 P.3d 352 (2010), *review denied*, 170 Wn.2d 1031, 249 P.3d 623 (2011) ("[B]ecause it is undisputed that Chambers did not object to admission of the evidence establishing her three prior DUI convictions in Washington, she waived any claim of error as to those convictions.")

Even if Parker did not effectively stipulate that the orders which he violated in the previous cases were issued under the requisite statutes, by failing to object to the court reading that stipulation and giving Jury Instruction No. 9, CP 47, without the State proving the admissibility of those prior convictions to the court, he waived any claim that the evidence was insufficient to prove that element.

> 3. Even if it was error to admit the evidence of Parker's two prior convictions, it was not an insufficiency of the evidence. If there was error it was an evidentiary error and is subject to the harmless error rule.

The Court of Appeals in Case found that the evidence which went to the jury was sufficient, but that the evidence supporting the admissibility of the evidence was not. It not only reversed the conviction but dismissed the charge. Case, 189 Wn. App. at 430. The State does not dispute that where the evidence is insufficient to support the conviction, reversal and dismissal is the remedy. State

v. Smith, 155 Wn.2d 496, 505, 120 P.3d 559 (2005). But the Court of Appeals in Case found sufficient evidence to support the jury's finding of guilt. Id. at 428. Improperly admitted evidence does not make the evidence insufficient. It merely means the court made an evidentiary error in admitting that evidence. The question here is admissibility, not sufficiency of the evidence.

Objections to otherwise inadmissible evidence can be waived, as argued above. Even if it was not waived, evidentiary errors are not presumed to be prejudicial or reversible. State v. Barry, 183 Wn.2d 297, 313, 352 P.3d 161 (2015). If there was no prejudice to the defendant, the error is not reversible. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). If the evidentiary error results from a constitutional violation it is subject to the constitutional harmless error standard—harmless beyond a reasonable doubt—and if it results from violation of an evidentiary rule, it is subject to the less stringent nonconstitutional standard—prejudice exists only if, within reasonable probability, the outcome of the trial would have been materially affected if the error had not occurred. Id.

If there were error, which the State does not concede, it was harmless. One can reasonably assume that Parker stipulated

because he was aware that his prior convictions were for violating validly issued orders, and the State could easily have proven that. Had he required the State to prove the admissibility of the prior convictions, the same evidence would have been before the court.

4. If there was error, it was invited error.

The invited error doctrine prevents parties from benefiting from an error they caused at trial, regardless of whether or not it was intentional. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). A central purpose of the doctrine is "to prevent parties from misleading trial courts and receiving a windfall by doing so." State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009).

In this case, Parker had four prior convictions for violating a no-contact order. RP 224. Had there not been a stipulation, the State would have sought to admit all four of them. RP 22. In case the jury found one of them insufficient, there would be three more to meet the element of two or more prior convictions. RP 22. However, Parker offered to stipulate to two convictions. RP 22-23. He did not even mention a requirement that the State prove the validity of the orders he was previously convicted of violating. If there was error, it was invited.

5. Even if there were insufficient evidence to support the conviction for felony violation of a restraining order, there was still sufficient evidence to support a conviction for the gross misdemeanor crime and the remedy is remand for entry of judgment on the lesser crime, or remand for retrial on the gross misdemeanor, not dismissal of the case.

Violating a no-contact order is a crime, even if it is the first violation of such an order. It is a gross misdemeanor. RCW 26.50.110(1)(a). Even if the evidence of Parker's two prior convictions was improperly admitted, the State still proved that he violated the order in place protecting the victim in this cause. The remedy should be remand to enter a judgment for the gross misdemeanor of violation of a no-contact order and resentence.

The jury was instructed as to the elements of violation of a no-contact order in Instruction Nos. 11 and 12. The two instructions varied only by the number of the charge addressed.

> To convict the defendant of the crime of violation of a no contact order as charged in Count [I or II], each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about August 7, 2013, there existed a no contact order applicable to the defendant;
>
> (2) That the defendant knew of the existence of this order;
>
> (3) That on or about said date the defendant knowingly violated this order;

> (4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
>
> (5) That the defendant's act occurred in the State of Washington.

CP 48, 49.

A defendant may be convicted of a lesser degree of the crime charged. RCW 10.61.010. The gross misdemeanor violation of a no-contact order includes all of these elements except the fourth. RCW 26.20.110(1)(a). A case may be remanded for resentencing on a lesser included offense where the jury has explicitly been instructed on that offense or where the record reveals that the jury expressly found each of the elements of the lesser offense. State v. Green, 94 Wn.2d 216, 234-35, 616 P.2d 628 (1980). A jury instruction on the lesser offense is not required before an appellate court may remand for resentencing on a lesser-included offense. In re Pers. Restraint of Heidari, 174 Wn.2d 288, 298, 274 P.3d 366 (2012) (Justice J. Johnson concurring/dissenting). "[W]hen an appellate court finds the evidence insufficient to support a conviction for the charged offense, it will direct a trial court to enter judgment on a lesser degree of the offense charged when the lesser degree was necessarily proved at trial." State v. Garcia, 146 Wn. App. 821,

830, 193 P.3d 181 (2008), *review denied*, 166 Wn.2d 1009, 208 P.3d 1125 (2009).

In the event this court finds that Parker did not stipulate to the admissibility of his prior convictions, or that he did not waive his right to appeal their admissibility, or that there was not harmless error or invited error, then the remedy is to remand for entry of judgment of the lesser gross misdemeanor violation of a no-contact order and resentencing.

D. CONCLUSION.

The State respectfully asks this court not to follow the holding of Case. That case did not consider the nature of stipulations, waiver, harmless error, invited error, or entry of judgment on the gross misdemeanor. The State respectfully asks this court to affirm Parker's convictions.

Respectfully submitted this 20th day of May, 2016.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 20th day of May, 2016, at Olympia, Washington.

Cynthia Wright

CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTOR

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